

(1999) 07 KL CK 0054

High Court Of Kerala

Case No: O.P. No. 16064 of 1999

Vishnu and Another

APPELLANT

Vs

Bhanumathy Amma

RESPONDENT

Date of Decision: July 15, 1999

Acts Referred:

- Guardians and Wards Act, 1890 - Section 10(3)

Citation: AIR 2000 Ker 34 : (1999) 3 ILR (Ker) 518 : (2000) 1 RCR(Civil) 329

Hon'ble Judges: K.S. Radhakrishnan, J

Bench: Single Bench

Advocate: P. Vijaya Bhanu and T.A. Unnikrishnan, for the Appellant;

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K.S. Radhakrishnan, J.

Question that has come up for consideration in this case is whether non-compliance with Section 10(3) of the Guardians and Wards Act would entail dismissal of the application.

2. Petition u/s 10(3) of the Guardians and Wards Act was filed by the respondent herein, who is the grandmother of the first petitioner. Second petitioner is the father of the first petitioner. Respondent's daughter who was the mother of the first petitioner, is no more. Petition was filed before the Family Court on 13-7-1995. Second petitioner filed objections on 19-8-1998 after three years of filing of the O.P., stating that petition had to be rejected due to non-compliance with Section 10(3) of the Guardians and Wards Act. According to second petitioner, respondent did not file a declaration expressing her willingness to act as guardian of the first petitioner. Compliance with the provisions of Section 10(3) is, according to second petitioner, mandatory and therefore petition preferred by the respondent is liable to be dismissed.

3. Court below rejected the contention of the second petitioner stating that second petitioner had filed the objections after a period of three years. According to Court below, even at the time of counselling no such objection was raised by the second petitioner. Court below took the view that petition cannot be rejected on that ground alone. Aggrieved by the same, second petitioner, along with his child, has approached this Court.

4. Counsel for the petitioners Sri. T. A. Unnikrishnan contended that Court below committed an error in entertaining the application, which is not in accordance with Section 10(3) of the Guardians and Wards Act. According to counsel, respondent ought to have given a declaration expressing her willingness to act as a guardian. Counsel submitted that this is a mandatory requirement. Counsel relied on a decision of a Division Bench of the Calcutta High Court in Rabindra Nath Mukherjee Vs. Abinash Chandra Chatterjee, and contended that in the absence of declaration u/s 10(3) of the Act, petition has to be dismissed.

5. Petition was filed by the grandmother of the child u/s 10 of the Guardians and Wards Act. In this connection it is profitable to refer to Section 10(3) which is extracted below :

"Section 10(3) The application must be accompanied by a declaration of the willingness of the proposed guardian to act, and the declaration must be signed by him and attested by at least two witnesses."

Admittedly no such declaration has been made by the respondent. Question that is to be considered is whether it is a mandatory requirement, and if it is mandatory, is it necessary that that requirement should be complied with at the time of submission of application?

6. I am of the view that the declaration of willingness of the person to act as a guardian is a mandatory requirement. Section 10(3) specifically says that application should be accompanied by a declaration of the willingness of the proposed guardian to act, and the declaration should be signed by him and attested by at least two witnesses. The declaration before the Court expressing one's willingness to act as guardian of a minor is an affirmation to the Court that he would look after the welfare of the minor. The provision for attestation by at least two witnesses adds sanctity to that declaration. Therefore Section 10(3) is mandatory in nature, and has to be complied with by a person who moves an application to act as a guardian.

7. The further question to be considered is whether non-compliance with the said provision would entail dismissal of the application in limine. Court may at the time of presentation of the application dismiss the same for not being in accordance with law. But after having entertained the application, and the matter was proceeded with, question arises is whether Court could grant an opportunity to the person to act as guardian to comply with Section 10(3) of the Act. I have already found that compliance with Section 10(3) is mandatory. However, Court has got discretion to

give an opportunity to the party to comply with the said provision, if the application has already been entertained by the Court.

8. In this connection it is profitable to refer to the decision of a Division Bench of the Calcutta High Court in Satyendra Nath Maitra and Another Vs. Balaram Chakraborty, , wherein Calcutta High Court held as follows :

The provisions of Sections 10 and 11 relate to matters of procedure. In case an application is not in conformity with the said provisions, the Court before whom such an application is made, may call upon the applicant to remove the defects in question. In case, the applicant fails to comply with such an order, the Court may reject the application for guardianship or custody. But, if no such objection is at all raised in the trial Court and the said Court passes an order on merits, the party preferring an appeal against such an order ought not to be allowed to contend before the appeal Court for the first time that for the application being defective in form, it ought to be rejected in limine. On the principles embodied in Section 99, C.P.C. the appellate Court legitimately may refuse to reverse or vary the order appealed against on account of such error or irregularities not affecting the merits or jurisdiction. But if on the other hand, on account of any irregularity, the merits of the case is affected, the appellate Court might entertain the said objection and pass appropriate orders." Delhi High Court in Gore Lal v. Santosh alias Phoolwati (1985) 1 DMC 290 held that ex facie when the mother applied for guardianship, it had the implication of the declaration that she was willing to act as guardian. The technical requirement of attestation by two witnesses, of course, remained there, but this should not essentially have proved fatal as such technicality can be required to be complied with subsequently as well.

9. On the basis of the abovementioned judicial pronouncements, I am of the view that requirement u/s 10(3) is a mandatory requirement, however, Court has got discretion to permit the party to comply with the said requirement at any stage of the proceedings.

Under the abovementioned circumstances, I am inclined to allow the Writ Petition, setting aside the order of the Court below, and hold that requirement u/s 10(3) of the Guardians and Wards Act is a mandatory requirement, and direct the Court below to permit the respondent to comply with the said requirement within a time specified and proceed with the case.